

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of	)	
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Amendment of Certain of the Commission's	)	GC Docket No. 10-44
Part 1 Rules of Practice and Procedure and	)	
Part 0 Rules of Commission Organization	)	
	)	

**COMMENTS OF TELECOMMUNICATIONS LAW PROFESSIONALS PLLC**

Telecommunications Law Professionals PLLC (“TLP”) hereby respectfully submits its comments in response to the *Public Notice*<sup>1</sup> released by the Federal Communications Commission (the “FCC” or “Commission”) seeking comment on the benefits and burdens of requiring parties submitting comments in rulemaking proceedings to file all cited materials.<sup>2</sup> While TLP supports the Commission’s efforts to improve record-based decisionmaking, a rule requiring that *all* cited materials be filed in full is overbroad and would result in more harm than good. TLP submits that a more targeted approach, which limits the scope of the materials required to be filed, will accomplish the Commission’s stated goal of “promoting transparent

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<sup>1</sup> *Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decisionmaking*, GC Docket No. 10-44, DA 11-1950 (rel. Nov. 29, 2011) (“*Public Notice*”).

<sup>2</sup> In order to provide for a consistent pleadings practice across different proceedings, TLP recommends that the Commission adopt its modified rule broadly for all Commission proceedings, including petitions to deny applications and petitions for declaratory ruling, as opposed to limiting these rules solely to rulemaking proceedings.

decision-making”<sup>3</sup> while limiting the burdens placed on legal practitioners and their clients. In response, the following is respectfully shown:

## I. INTRODUCTION

TLP, although newly-formed, is no stranger to the FCC rulemaking process – its attorneys have nearly 85 years of combined experience advocating before the Commission. The firm and its attorneys are frequent participants in agency proceedings, file numerous comments, and regularly participate in Commission meetings resulting in many *ex parte* filings on behalf of a diverse array of clients. Indeed, TLP or its members have filed comments in or otherwise been participants in nearly 50 ongoing or recently-concluded Commission proceedings. Based on this substantial experience, TLP applauds the Commission for taking steps to improve “[t]ransparency, robust public participation, and informed decision-making” in FCC proceedings.<sup>4</sup> Transparency and informed public participation are the cornerstones of the agency rulemaking process, and any steps to improve in these areas will no doubt improve the already-high quality of the Commission’s work.

However, TLP is concerned that Commission staff occasionally submits substantial collections of materials very close to the conclusion of rulemaking proceedings.<sup>5</sup> Although additional relevant information which completes the record in a proceeding is generally

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<sup>3</sup> *Public Notice* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; see also Letter from Todd D. Daubert & J. Isaac Himowitz, Counsel for SoutherinLINC Wireless and the Universal Service for America Coalition, to Chairman Genachowski, WC Docket No. 10-90 *et al.*, at 3 (Oct. 21, 2011); Letter from David A. LaFuria, Counsel to Allied Wireless Communications Corp. *et al.*, WC Docket No. 10-90 *et al.* (Oct. 20, 2011); see also *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 18049-50 (2010) (dissenting Stmt. of Cmmr. McDowell), *recon. and pets. for review pending*.

appreciated, TLP agrees that massive data uploads “towards the end of the proceeding, might not serve [the] intended purpose of promoting transparent decision-making and might, indeed, limit opportunities for meaningful responsive comment.”<sup>6</sup> In certain instances, meaningful public participation will be aided if interested parties have earlier access to materials, upon which the Commission relies, which are cited in the record but unfiled. However, a blanket requirement that *all* cited materials be filed along with pleadings is overbroad and detrimental to the public comment process. In reality, the vast majority of materials cited in pleadings is publicly-available, and can be obtained with little effort. TLP recommends a more targeted approach, which would exclude easily-obtained materials from the filing requirement.

## **II. REQUIRING SUBMISSION OF ALL CITED MATERIALS UNFAIRLY BURDENS SMALL BUSINESSES**

The Commission’s public comment process is at its best when myriad parties can offer contrasting viewpoints, leading the Commission to a reasoned, data-driven conclusion. This requires that the public comment process be manageable for all interested parties, regardless of their size or resources. Unfortunately, requiring the submission of all cited materials will unfairly burden resource-constrained small businesses. Certain of TLP’s clients do not possess the vast resources at the command of large nationwide and international corporations. Accordingly, TLP is particularly attuned to the needs of, and challenges faced by, small and mid-sized companies that have an interest in Commission proceedings. If TLP is forced to spend substantial additional time collecting, organizing and filing all cited materials, the cost to clients for preparing FCC pleadings may materially increase. Many TLP clients operate very lean

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<sup>6</sup> *Public Notice* at 2. As an additional measure, TLP also recommends that the Commission adopt a rule requiring that interested parties be permitted at least 10 days to respond to any Commission filing in a proceeding. This will ensure that the Commission has the benefit of meaningful responses as it considers the various materials on which it proposes to rely.

businesses, and controlling legal costs is important to them. A rule that broadly increases the time spent to prepare Commission filings would represent a hardship to many TLP clients. Faced with rising legal costs, small and mid-sized companies may respond by filing less-robust pleadings, or by deciding not to participate *at all* in certain proceedings. This would hinder the Commission's ability to reach reasoned decisions, and place these interested parties at a further disadvantage with respect to their much-larger counterparts. Rather than spending their scarce resources on increased legal budgets, small and mid-sized businesses, and the public, are better served if this capital is directed towards important Commission initiatives, like technological innovation and broadband deployment.

### **III. REQUIRING SUBMISSION OF ALL CITED MATERIALS IS UNNECESSARY AND BURDENSOME TO PRACTITIONERS**

While some materials in the records of various proceedings may cite to little-known or internal studies, ordinarily the majority of materials cited in pleadings: (a) are publicly available on the Internet (many on FCC.gov), (b) are available through commonly-used legal search engines (such as Lexis, Westlaw or the free Justia legal database) or (c) are articles from commonly subscribed-to trade publications (such as Communications Daily or POLITICO). The vast majority of FCC practitioners, and the general public, have ready access to each of these sources of information, making redundant any requirement that such materials be filed in the record. Indeed, in many instances direct "hotlinks" are provided within the text of electronically-filed pleadings – meaning that the full text of a cited work is just a click away.

As an example, TLP reviewed comments filed by its attorneys on behalf of MetroPCS Communications, Inc. in the net neutrality proceeding.<sup>7</sup> In that pleading, approximately 90 separate sources are cited – more than 93% of which are available to interested parties on the Internet (many with direct hotlinks provided in footnotes), on the Commission’s website, or through commonly-used legal search engines. The rule as proposed would have required TLP to copy, create and index *90 separate exhibits* to this pleading – no small undertaking. Thus, for the seven cited materials that were not immediately available to commenters, the Commission’s proposal would require the filing of 83 others that already were available with an Internet connection and minimal effort.

Such a broad obligation will be to the detriment of the Commission’s decisionmaking process. More time spent on indexing and filing exhibits means less time spent on researching and writing the document itself. Given the finite number of days available to practitioners to prepare pleadings prior to Commission deadlines, many of which are on short timeframes, an increased volume of paperwork associated with filing comments may reduce the quality of submissions that the Commission receives. In addition, copying, organizing and filing exhibits will drive up the cost and efforts associated with filing comments, which will have public interest implications. And, there is an environmental cost associated with increasing the volume of pleadings, which are likely be reproduced and distributed, in some instances in paper hard copies. These increased costs may cause filers to reduce the amount of materials that they cite in an effort to avoid burdensome filing requirements, leading to less data-driven decisionmaking.

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<sup>7</sup> Comments of MetroPCS Communications, Inc., GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 14, 2010).

#### **IV. A MORE TARGETED APPROACH IS APPROPRIATE**

TLP admits that giving proceeding participants access to otherwise-inaccessible materials is important. However, rather than file *all* materials cited in pleadings, TLP submits that a more targeted approach is preferable. Because such a substantial portion of materials cited in the record are available with ordinary effort, TLP recommends that the Commission exclude from any obligations it adopts in this proceeding those cited materials that are:

1. Publicly available on the Internet (exclusive of those behind a “pay wall” or requiring a website subscription);
2. Available on a widely-used legal search engine (such as Lexis or Westlaw) under standard rate plans; or
3. Part of an industry publication commonly subscribed-to by FCC practitioners (such as Communications Daily or POLITICO).

Recognizing that not all materials are permitted to be filed due to copyright restrictions, TLP also recommends that there be an exception to any rule if filing cited materials would subject the filer to liability for copyright infringement. In those cases, commenters should provide the maximum allowable relevant excerpt of the cited material. Such excerpts also should be accompanied by a description how and where interested parties may obtain a full copy of the cited work.

Notwithstanding the above, commenters would, of course, be required to file any internally-generated data or compilations of information that it relies upon in its pleadings. This information should be the real target of any new Commission rule, as this material is not available at all, except through the commenter. Particularly where such information will be

relied upon by the Commission, it is important that other participants in the proceeding have access to it as promptly as possible.

## **V. CONCLUSION**

The Commission's goal of promoting access to otherwise-inaccessible cited materials is laudable. Meaningful public participation is possible only when all interested parties are operating using uniform information. However, the Commission's broad proposed approach goes too far, and would result in obligations that are burdensome on practitioners and on their clients. In particular, small and mid-size companies may be unable to meet these obligations using existing resources, resulting in diminished participation. Instead of requiring all cited materials to be filed, TLP recommends that the Commission instead adopt a targeted rule requiring the filing of all cited materials that are not: (a) publicly available on the Internet; (b) available through a commonly-used legal search engine, such as Lexis or Westlaw; or (c) part of a commonly-read industry publication, such as Communications Daily or POLITICO. By adopting this more targeted rule, the Commission can ensure more meaningful public participation without unnecessarily burdening participants.

Respectfully submitted,

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